81-2206

Office - Supreme Court, U.S.
FILED
MAY 28 1982
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1981

STATE OF ALABAMA,

Petitioner

v.

HOWARD L. DICKERSON,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

ELIZABETH ANN EVANS
ASSISTANT ATTORNEY GENERAL OF ALABAMA

OFFICE OF THE ATTORNEY GENERAL
250 Administrative Building
Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR APPELLEE

QUESTIONS PRESENTED

1. Whether or not a federal appellate court can supplement the record on appeal with evidence not before the federal district court.

2. Whether an evidentiary hearing should have been held to determine whether a missing witness would have in fact given alibi testimony.

PARTIES

In the United States District Court for the Northern District of Alabama and the United States Court of Appeals for the Eleventh Circuit, the parties were Howard L. Dickerson, Respondent herein, and the State of Alabama, Petitioner herein.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CASES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
SUMMARY OF THE ARGUMENT	4
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	12
CERTIFICATE OF SERVICE	13

TABLE OF CASES

	PAGE
Ayers v. Ciccone, 431 F. 2d 724 (8th Cir. 1970)	8
Burgett v. State of Alabama, 516 F. 2d 525 (5th Cir. 1975)	6
Cuyler v. Sullivan, 428 U.S. 106 (1976)	9
Erkins v. Bryan, 663 F. 2d 1048 (11th Cir., 1981)	8
Gatewood v. United States, 209 F. 2d 789 (2nd Cir. 1953)	9
Townsend v. Sain, 372 U.S. 293 (1963)	10
Turk v. United States, 429 F. 2d 1327 (8th Cir. 1970)	9
United States v. Aulet, 618 F. 2d 182 (2nd Cir. 1980)	9
United States ex rel Kellogg v. McBee, 452 F. 2d 134 (7th Cir. 1971)	7
Washington v. Beto, 424 F. 2d 1035 (5th Cir. 1970)	6

OPINIONS BELOW

The judgment of the Alabama Court of Criminal Appeals is found in Appendix D. The memorandum opinion and judgment of the United States District Court for the Northern District of Alabama is found in Appendix A. The decision and denial of rehearing of th Eleventh Circuit Court of Appeals is found in Appendix B.

JURISDICTION

The order of the United States Court of Appeals reversing the District Court's judgment was issued on February 16, 1982. Rehearing was denied on March 30, 1982, and this petition is filed within sixty days of that date.

The jurisdiction of this Honorable Court is invoked under 28 United State Code, Section 1224(1).

STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, Section 2254, the same being voluminous is submitted as Appendix C hereto.

STATEMENT OF THE CASE

The Federal District Court of the Northern District of Alabama entered an order denying Appellant's petition for habeas corpus without an evidentiary hearing. After oral argument the Circuit Court of Appeals for the Eleventh Circuit supplemented the record with the state trial court transcript which was not in evidence before the federal district court and then reversed this case on that evidence.

STATEMENT OF THE FACTS

Howard Luther Dickerson was found guilty of robbing Eugene McCamy who identified Dickerson as the robber at trial. Dickerson's defense was that he was elsewhere at that time and subpoenaed George Echols, an Anniston police officer, as an alibi witness. Although Echols was served and an attachment was issued, he never appeared. At this time no one knows to what Echols would have testified had he been present.

SUMMARY OF ARGUMENT

It is not proper for a federal appellate court to supplement the record after oral argument on appeal and then reverse on the basis of that evidence. This is especially true where there are factual issues still unresolved as in this case where the Eleventh Circuit reversed because an alibi witness did not testify at trial and yet it is still not known whether the witness would have actually testified that Dickerson was in another city at the time of the crime.

REASONS FOR GRANTING THE WRIT

I.

A FEDERAL APPELLATE COURT CAN NOT SUPPLEMENT THE RECORD ON APPEAL WITH EVIDENCE NOT BEFORE THE FEDERAL DISTRICT COURT. (Conflict between Circuit Courts of Appeals)

On appeal after oral argument the Circuit Court supplemental the record with the state trial court transcript which was not in evidence before the federal district court and then reversed this case on that evidence, instead of remanding the case to federal district court for an evidentiary hearing. Remanding for an evidentiary hearing would have allowed not only for the state court transcript to be made officially part of the record, but would have also allowed the State to produce evidence which could affect the transcript's materiality (i.e. an affidavit from the missing witness stating what his testimony would have been).

In the first place, failure to remand for an evidentiary hearing specifically violates the procedures established in Burgett v. State of Alabama, 516 F. 2d 524 (5th Cir. 1975) and Washington v. Beto, 424 F. 2d 1035 (5th Cir. 1970).[1] In those cases there was no transcript of the state proceedings in the appellate record and it was felt that essential facts were missing. Therefore, the cases were remanded to the district court for a review of the transcript of the state proceedings and/or an evidentiary hearing on the ground that the district court should consider the facts first.

---

1. The new Eleventh Circuit has adopted as its precedent the case law of the former Fifth Circuit. Bonner v. City of Prichard, Alabama, 661 F. 2d 1206 (11th Cir. 1981).

Secondly, the State contends that the precedent of supplementing a record by an appellate court is one of exceptional importance which should be considered by the Supreme Court and that the better precedent is the one observed in the Seventh and Eighth Circuit Courts of Appeals.

In U.S. ex rel Kellogg v. McBee, 452 F. 2d 134 (7th Cir. 1971), the Circuit Court refused to allow in a habeas corpus appeal the United States government to supplement the appellate record and held that Rule 10(e), Federal Rules of Appellate Procedure, does not give the authority to admit on appeal a document, file, or series of papers which neither were introduced into evidence, nor, in any manner, made a part of the record in district court. Other Seventh Circuit cases were also cited as precedent.

In Ayers v. Ciccone, 431 F. 2d 724 (8th Cir. 1970), that Circuit Court also refused to allow before it matters which were not presented to the district court to comprise part of the record evidence and this too was a habeas corpus case.

On the other hand, none of the cases cited in the Eleventh Circuit's opinion as authority were habeas corpus cases. The cite to Erkins v. Bryan, 663 F. 2d 1048 at 1052 n. 1 (11th Cir. 19810 (a case construing the Landrum-Griffin Act) reveals that no authority was cited for the precedent and that after Appellee quoted parts of a constitution in affidavits, the Appellant made a motion to have the entire constitution put in evidence, which was granted when the Appellees did not object. The other cases cited by the panel were either Second or D.C. Circuit cases dealing with direct appeals of federal criminal convictions

where the supplemented materials were preliminary proceedings in their own district courts or materials prepared by United States Attorneys used in connection with the conviction in federal district Court. United States v. Aulet, 618 F. 2d 182 (2nd Cir. 1980); Turk v. United States, 429 F. 2d 1327 (8th Cir. 1970); Gatewood v. United States, 209 F. 2d 789 (D.C. Cir. 1953).

Lastly, the State urges overruling the Eleventh Circuit's action on the ground that this violates the spirit of Cuyler v. Sullivan, 428 U.S. 106, 121 (1976) which provides that a federal appellate court is justified in resolving an issue not passed on below where the proper resolution is beyond any doubt or where injustice might otherwise result. In this case the proper resolution is not beyond any doubt and injustice has resulted. By reversing this case on the

trial transcript and failing to remand for an evidentiary hearing the Circuit Court has precluded the State from obtaining an affidavit from the missing witness stating what his testimony would have been. If the witness states that if he had been present at the original trial he would not have given the Dickerson an alibi, it would seem that a retrial of the Dickerson would be unnecessary and an injustice to the State would result from the grant of the writ of habeas corpus.

II.

AN EVIDENTIARY HEARING SHOULD HAVE BEEN HELD TO DETERMINE WHETHER A MISSING WITNESS WOULD HAVE IN FACT GIVEN ALIBI TESTIMONY

(Conflict with controlling decision)

In Townsend v. Sain, 372 U.S. 293 (1963), this Court held that an evidentiary hearing must be held if the

material facts were not adquately developed at the state court hearing. As mentioned in the previous argument, it is unknown as to whether the missing witness' would have actually bolstered Dickerson's alibi defense if he had testified. Certainly this is a material fact which must be developed before a decision can be made on the merits of this case.

CONCLUSION

In conclusion the Petitioner respectfully submits that this case presents important questions oflaw involving conflicts between the Circuit Courts of Appeal and with prior decisions of the Court. For these reasons the Petitioners pray that this Honorable Court will isse the writ of certiorari and review the decision and opinion of the Honorable Court of Appeals and on such review will reverse the decision of said Court.

Respectfully submitted,

Charles A. Graddick

CHARLES A. GRADDICK
ATTORNEY GENERAL

Elizabeth Ann Evans

ELIZABETH ANN EVANS
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Elizabeth Ann Evans, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for State of Alabama, Petitioner, do hereby certify that on this 28th day of May, 1982, I did serve the requisite number of copies of the foregoing on the Attorney for Howard Luther Dickerson, Respondent, by mailing same to them, first class postage prepaid and addressed as follows:

B. G. Minisman
FULFORD, POPE & MINISMAN
2326 Highland Avenue
Birmingham, Alabama 35205

Elizabeth Ann Evans

ELIZABETH ANN EVANS
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:
Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130